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IN THE

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 632

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JAMES H. McKENNEY,
Clerk.

THE UNITED STATES OF AMERICA ON THE RELATION OF THE RIVERSIDE OIL COMPANY, A CORPORATION,

Plaintiff in Error

vs.

RALPH A. HITCHCOCK, SECRETARY OF THE INTERIOR,

Defendant in Error

REPLY BRIEF OF PLAINTIFF IN ERROR

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Reply Brief for Plaintiff in Error

Counsel for defendant in error insist that the land department is a special tribunal acting judicially upon all matters affecting the public lands, and that its action in every such matter, whether right or wrong, is final and conclusive and cannot be interferred with by mandamus.

We reply:

First. That judicial action presupposes authority to render a final and conclusive judgment in some controversy between adverse parties.

Second. That the land department acts (*quasi*) judicially and finally only with respect to questions of fact.

Third. That due process of law requires that controverted questions of fact in the land department shall be determined by hearings before the local land officers conducted in accordance with the rules of evidence and procedure.

Fourth. That the land department has no power to determine controverted questions of fact upon *ex parte* affidavits.

Fifth. That the land department cannot act judicially with respect to questions of *law* because its determination of such questions is not final, but always subject to review by the courts.

Sixth. That in this case there was no controverted question of fact to be determined by the land department.

Seventh. That the defendant in error does not claim that in this case the land department determined any controverted question of *fact*.

EIGHTH. That the defendant in error properly held in the land department and now sets up in his answer that questions respecting the character of land selected are to be determined by the conditions existing at the time of selection.

NINTH. That the defendant in error admits that the lands in question at the date of selection were vacant lands open to settlement and subject to selection under the act of June 4, 1897.

TENTH. That the defendant in error acted solely upon the record of the selections supplemented by the uncontroverted fact that subsequent to the selections the land became occupied and known to be valuable for deposits of petroleum.

ELEVENTH. That the defendant in error claims only that the selections were defective and void on their face because of alleged lack of accompanying non-occupancy affidavit and that the subsequent and intervening occupation and discovery of petroleum rendered unavailing the supplemental non-occupancy affidavits filed after his first decision.

TWELFTH. That the action of the defendant in error in attempting to reject the selections for lack of accompanying non-occupancy affidavits was unwarranted and unlawful.

THIRTEENTH. That the defendant in error had no legal discretion to reject the selections and deny patent for such a cause.

FOURTEENTH. It being admitted that the land was subject to selection at the time of selection, and the question of accompanying affidavit being thus eliminated, the issuing of patent is a mere ministerial duty which will be compelled by mandamus.

These propositions are sustained in our opening brief, but we now desire to point out specifically the fallacy of the contention of counsel for defendant in error, and the

error into which the Court of Appeals of the District of Columbia fell in attempting to apply the doctrine contended for by counsel for the defendant in error.

THE INCONSISTENCY OF THE DEFENSE.

The defendant in error, in the land department, overruled the contention of his present counsel (Mr. Chapman, who there led the attack upon these selections), that no title, legal or equitable, can vest in a selector until approval of the selection by the Commissioner or the Secretary, but yet retains the same learned counsel to appear for him in these proceedings and make the same contention and argue that the ruling of the defendant in error, that the equitable title vests at the time of selection (which he also sets up in his answer), is erroneous; and the learned Assistant Attorney General for the Interior Department, who sat in this case and prepared the decision for the signature of the defendant in error also signs the brief for defendant in error, wherein the same erroneous contention is made in the effort to overrule the sound position taken by him in said decision and set up in the answer with respect to the time of vesture of the equitable title.

It is also to be remarked that counsel for the defendant in error in their attempt to overrule him in this respect, have been unable to satisfy themselves as to just what branch of the land department is to give the approval upon which they lay so much stress, but content themselves with the general statement that some adjudication of the selection by the *land department* is necessary to vest the title.

THE CERTIFICATE OF THE LOCAL OFFICERS.

It has been the uniform ruling of the land department and the courts that the certificate of the local land officers vests the equitable title for all the purposes of ownership—taxation, conveyance, dower, descent, etc.; but counsel for

defendant in error protest that this particular instance is an exception, and that there must be an adjudication by some higher authority, but do not attempt to say whether that authority is the Commissioner, or the Secretary, or both.

In the selections here, not only did the selector do everything that was required of him by the law, but the local officers gave their certificate and forwarded the papers to the General Land Office for patenting.

THE JURISDICTION OF THE LAND DEPARTMENT.

The equitable title thus acquired necessarily results in patent unless the Commissioner or Secretary, in the exercise of supervisory power, successfully attack it, by proper proceedings, for illegality, fraud or mistake.

The land department and the courts have uniformly held that *this supervisory power is limited to the investigation and determination, in proper proceedings, of conditions existing at the time the equitable title vested*, that is to say, when the entry or selection was made, and that, while the jurisdiction of the land department continues until patent issues, such jurisdiction is governed by the limitations upon the supervisory power of the Commissioner and Secretary.

Counsel for the above stated defendant in error, however, cite the authorities establishing these propositions, and they boldly conclude with the startling *non-sequitur*, that it is, therefore, clear that no title, legal or equitable, can vest until adjudication by the land department (Commissioner or Secretary, which?) that patent shall issue.

THE PROTESTS.

The Court of Appeals, *through misconception of the record and unfamiliarity with the procedure of the land department*, found a stumbling block in the protests; and counsel for the defendant in error, in the face of the admissions of the Secretary's answer, boldly assert in their brief that the pro-

tests showed that the protestants had absolute title to the lands in question with which even Congress could not interfere.

We think we have, in our opening brief, eliminated the protests from consideration in this case, but feel that this result will be rendered clearer by the following suggestions.

Two months after the selections were made, and after the cases had gone to the General Land Office for patenting, these so-called protests and affidavits (R. 26-54), were filed in the local land office alleging that certain persons had in June, 1899, made placer mining locations upon the lands selected and that their grantees were claiming possessory rights under said locations and developing the land for supposed deposits of petroleum, and praying that a hearing be ordered for the purpose of determining the character of the land, two of the protests also praying that further proceedings should be suspended until further development and operation should demonstrate the petroleum character and productiveness of the land.

Those protests were filed upon the theory that petroleum is a mineral within the meaning of the public land laws and that lands known to contain petroleum are mineral lands and therefore reserved from settlement; and that after selection under the act of June 4, 1897, the selected land remains open to exploration and development to the end that its character as mineral land may be subsequently determined. The protestants, of course, realized that, under such theory, discovery was essential to the establishment of the character of the land as mineral, and, being unable to allege specifically the existence of any known valuable deposits of petroleum at the time of selection in the protests and affidavits, made vague and general claim of discovery at the time of location of the alleged placer claims, not supported by any allegation of fact, and also claimed that the alleged locators or the Elwood Oil Co., a corpora-

tion, their grantee, had afterward sunk a prospect well upon each tract to a depth of about 120 or 130 feet which, as was claimed, showed traces of oil, but not alleged in such terms as, even if true, to amount to discovery.

Under the practice of the land department the function of the protests was not to assert any claim of the protestants for adjudication, but to admonish the Government that the land was valuable for supposed deposits of petroleum and, therefore, not subject to selection, and to induce the land department to take action against the selections, which, if it effected the rejection of the selections, would incidentally enure to the benefit of the protestants who were then in *forcible* possession of the lands.

MOTIONS TO DISMISS PROTESTS.

Under the practice of the land department with respect to protests, the selector filed motion (R. 55, 56) to dismiss these protests because as supported by the accompanying affidavits, they failed to allege facts sufficient to invoke the supervisory power of the land department to make an investigation as to the character of the land, in that the allegations of the affidavits, even if true, did not show discovery, within the meaning of the law, at or prior to the time of the forest lieu selections.

THE COMMISSIONER'S ACTION.

The Commissioner of the General Land Office, evidently regarding the showing made by the protestants as insufficient to justify the department in instituting proceedings against the selections, and desiring to be more fully informed as to the situation, caused an investigation to be made on behalf of the government by a special agent, whose report was and is held secret by the department. Then with these *exparte* papers (the protests and affidavits and the special agent's report), before him, the question for determination by the Commissioner was whether or not charges, in the

nature of an indictment or information, should be preferred against the selections to be tried before the local officers as a trial court governed by the legal rules of procedure and evidence.

On December 18, 1900, the Commissioner rendered a rambling decision (R. 57) full of erroneous statements and applications of the law and settled rulings of the courts, holding that the title of the selector could not vest until approval of the selections by the Commissioner and that, therefore, the land was still open to exploration under the mining laws and if at that date (one year after the selections), it could be shown to be mineral it would defeat the selections, *and concluding by directing the local officers to proceed under the instructions governing the manner of proceeding upon special agents' reports when the government desires to contest the validity of an entry* and to serve upon the selector a notice defining the charges against the selections and allowing the selector thirty days within which to apply for a hearing upon such charges, at which hearing the government would assume the burden of proof.

This decision in effect directed charges, based upon the special agent's secret report, to be preferred against the selections upon which the selector could apply for a hearing, at which hearing, under the Commissioner's ruling, the known condition of the land at the time of the hearing, more than one year after the selections, would be the issue.

APPEAL TO THE SECRETARY.

Thereupon the plaintiff in error, successor in title to the selector, caused an appeal to be taken to the defendant in error, Secretary of the Interior, assigning numerous errors in the Commissioner's decision (R., p. 72). This appeal, under the rules of the land department, operated as a supersedeas of the Commissioner's action, and the question before the defendant in error was, whether the Commissioner had

any authority to take any action other than to pass the selections to patent and whether or not charges could or should be preferred against the selections.

THE SECRETARY'S ACTION.

Thereafter on April 25, 1901, (R. 76) the defendant in error rendered a decision in the matter of said appeal wherein he held that *the title of the selector vests when he has done all of the acts required to make selection, and that questions respecting the class and character of the selected lands are to be determined by the conditions existing at the time selection is so made, and no change in such conditions subsequently occuring can affect the selector's title; that deposits of mineral must be known at the time of selection in order to defeat the selection; and that subsequent discovery will not affect the selector's title.*

The defendant in error thus reversed the principles announced by the Commissioner, but arbitrarily held that "vacant" in the act of June 4, 1897, means unoccupied; that it was incumbent upon the selector to show that the land was unoccupied; that the land department by a recital in an unpublished form of selection had established a regulation requiring the filing, as a part of the selection, of an affidavit showing the land to be non-mineral in character and unoccupied; that the selector had not perfected his selection because he did not show the land to be unoccupied by filing with the selections a so-called non-occupancy affidavit; that therefore the papers filed by the selector at the time of selection would not justify the issuance of patent even if no protest had been filed and that, in view of the alleged admitted subsequent occupancy by the protestants and known value of the land for petroleum, it was apparent that the required proofs could not be supplied; and therefore ordered the selections to be rejected and cancelled.

The defendant in error thus arbitrarily held that the selector had never legally selected the land, because he had

not filed a so-called non-occupancy affidavit; in other words, that there was no selection to prefer charges against, which ruling, of course, rendered unnecessary the determination of the question of whether or not charges against the selections could or should be preferred, or a hearing could or should be ordered to adjudicate the known character of the land at the time of selection, and in his said decision the defendant in error vacated the Commissioner's action, thus leaving unexpressed his views as to the propriety of preferring charges against the selections, but the language of his decision necessarily implies that he recognized the fact that at the time of selection no discovery of petroleum in the lands had been made and that the case presented only the question of the effect of admitted subsequent discovery.

Thereupon, under the rules of practice of the land department, the selector filed a motion for review of said decision, assigning numerous errors therein (R. 100) and also filed two supplementary affidavits alleging specifically that the selected lands were unoccupied at the time of selection (R. 103, 104).

Thereupon a decision upon said motion for review was prepared under the direction of the Assistant Attorney General, signed by the defendant in error and promulgated April 12, 1902 (R. 104), ignoring the said supplemental affidavits and adhering to and attempting to justify the former decision in rejecting the selections for lack of accompanying non-occupancy affidavit.

THE QUESTION PRESENTED BY THE SECRETARY'S ACTION.

This disposition of the selections by the defendant in error primarily presented the question of the authority of the land department to reject a selection because of alleged lack of accompanying non-occupancy affidavit, and, under

the contention of the defendant in error that the land department is a special tribunal to adjudicate the character of the land at the time of selection, such disposition of the selections was a refusal to assume jurisdiction and determine whether or not charges should be preferred against the selections to be heard and determined by such special tribunal, and in this aspect the case fell into the recognized category of cases where mandamus is the proper remedy to coerce an inferior tribunal or officer who refuses to act or assume jurisdiction for an insufficient or illegal reason.

Even under the contention of the defendant in error, however, as to the function of the land department, charges against the selections could not be lawfully preferred or a hearing lawfully ordered unless the department were in possession of information which would enable it to make formal and solemn charge that the land *at the time of selection was not vacant land open to settlement.*

And remembering that the land department, through its special agent, had made investigation of the situation, it is apparent that the defendant in error was in possession of the facts and in position to say whether or not the Government could lawfully or reasonably prefer charges against the selections based upon the known character of the land at the time of selection.

THE ALLEGATIONS OF THE PETITION FOR MANDAMUS.

To show that, under any view, the equitable title of the selector, vested absolutely at the time of selection, the petition was prepared in a form to meet the rulings of the land department and alleged, (par. 9, R. 8, 9) that at the time of selection the lands in question had been, by the Surveyor-General, returned as agricultural, and were shown on the books and records of the land department as and being agricultural, not reserved or otherwise closed to

settlement; that there was upon such records no filing, entry, or claim to the same; that there had been no discovery of mineral therein and no mineral was known to exist therein, and that the complete title to the same was in the United States and the United States were the sole and exclusive possessors and occupiers thereof as part of the vacant public land open to settlement; and (Petn., par. 23, R. 17) that there was no one present on the land at the time of selection, and that no claim adverse to the selector then existed; and (Petn., par. 21, R. 16) that the supplemental affidavits (Exs. W and X, R.), as to the non-occupancy of the land at the time of selection, were true in fact; and (Petn., par. 14, R. 12) that at the time of selection no person or persons had any right, title, or interest, either vested or inchoate, in or to the lands selected, and that the alleged locaters were mere pretended explorers for minerals and had made no discovery of mineral but merely staked off pretended mining claims; that the alleged locaters made no discovery of mineral upon said lands and acquired no possessory or other rights therein or thereto, and by the alleged attempted conveyances to the protestants, their grantees, the latter acquired no rights whatever in or to the lands, and that the protestants grantees, never themselves staked off, or restaked any claim or claims upon the lands, and set up no claim except under the pretended locations made by their grantors; and (Petn., par. 24, R. 19) that after the selections were made the protestants for the first time entered into possession of the selected lands.

The petition also, as inducement to the issuance of the rule to show cause, recited the proceedings in the land department subsequent to the selections, and set out the full record in exhibits with the petition so as to show the manner in which the selections came before the defendant in error, and the single and sole ground upon which he attempted to reject them, viz., alleged lack of accompanying

proof of non-occupancy, and alleged this single and sole ground for such action in the following language (par. 23, R. 16, 17):

> "The Secretary erroneously held and decided that the land selected was not vacant land, though in truth and in fact vacant and unoccupied, if such vacancy and lack of occupancy were not shown by an affidavit of selector made and filed by him and as a part of said selection; and erroneously held and decided that to be vacant land in the meaning of the act of June 4, 1897, the selected land must be not only free from the presence of any one on the land as a matter of fact, but must be *shown* to be free from such presence of any one on the land at the date of selection by an affidavit of selector made and filed by the selector *as a part of the record of selection*, and that notwithstanding the selected land at the time of selection was in fact unoccupied, nevertheless the selection was void, so the decision arbitrarily holds unless the said selection was when made then and there shown to be on unoccupied land by an affidavit of selector as a part of the record of selection."

THE PRAYER OF THE PETITION.

The petition prayed that the writ of mandamus should issue to the defendant in error commanding him to recall and vacate his order rejecting the selections, reinstate the proceedings relating thereto, proceed therein as required by law, and order the selections passed to patent.

It will be observed that this prayer comprised three progressive elements of relief: first, to recall the order rejecting the selections and reinstate the proceedings; second, to proceed in the matter of the selections, and lastly, to pass the selections to patent.

Assuming the rejection of the selections for lack of accompanying non-occupancy affidavit to be arbitrary and

unlawful, the first element of relief would follow as consequence, and the matter would be restored to its status as presented by the appeal from the Commissioner, and the question would be whether charges could or should be preferred against the selections based upon the known character of the lands at the time of selection. If not, then there remained no obstacle in the way of patents.

THE SECRETARY'S ANSWER.

The defendant in error, being in possession of full information through his special agent's report and otherwise, and having opportunity to deny in his answer the allegations of the petition as to the condition of the land at the time of selection or to set up as a defense to the petition that the interest of the Government required the preferring of charges against the selections based on the known character of the land at the time of selection, could not consistently traverse any of the allegations of the petition, or plead any such defense, and did not attempt to do so, but in his answer, by not questioning any of the allegations of fact in the petition, admitted all of the facts as alleged to be true.

In our opening brief (pp. 30 to 36) we cite authorities in support of the fundamental rule of pleading and now add Halloway v. Whiteley, 4 Wall., 522, where this court applied the rule in mandamus, saying (p. 532):

> "This position is untenable. It is averred in the petition, and not denied in the answer—and, therefore, as in other like cases of pleading is to be taken as conceded—that the application was filed with the Acting Commissioner."

This admission in the answer eliminated every question of fact, thus rendering charges against the selections uncalled for and a hearing unnecessary and improper, even from the standpoint of the defendant in error, and admitting that

the government has no cause to contest the character of the land at the time of selection.

It is contended by counsel for defendant in error that the character of land in such case can only be determined by an express adjudication by the land department, and that such adjudication must be had in all cases before patent can issue, but, as we will show, after a final entry or selection a hearing as to the character of the land will be had only by order of the Commissioner, and such order will be given only when sufficient ground appears.

The facts being admitted, it is apparent that a hearing, the object of which would be to determine the facts, would be an absurdity.

The ruling of this court in Duluth & Co. v. Roy, 173, U. S. 587, is pertinent here. Mr. Justice McKenna, speaking for the court says:

> "But it is urged defendant in error may not be able to make final proof, and that the land department, whose jurisdiction is exclusive, may determine the lands not to be swamp or overflowed. Neither supposition can be indulged. The findings by the court show full qualification in the defendant in error, and we cannot presume that the land department will find against the fact, which the state courts have found, that the lands 'were not at the time of the passage of the act of March 12, 1860, nor were they ever, nor are they now, swamp, wet, or overflowed, or unfit for cultivation.'"

THE SECRETARY'S DEFENSE.

The facts being thus admitted in the answer, after also reciting the proceedings in the land department, the defendant in error, having no other defense, set up merely the alleged lack of accompanying proof of non-occupancy as his *sole defense* to the petition and his *only reason* for refusing to order the selections to patent, in the following language (par. 10, R.):

"And this respondent denies that he has illegally or arbitrarily held or decided any matter or thing whatsoever in respect of the said application for selection, and he avers that by the laws of the United States the duty is imposed upon him to construe the acts governing the disposition of public lands of the United States and of applying the same to cases coming before him on appeal from the Commissioner of the General Land Office; that in pursuance of the duties imposed, he was required to construe and apply the terms of the act of Congress of June 4, 1897, wherein it was provided that the owner of land included within the limits of the public forest reservation might select in lieu thereof a tract of vacant land open to settlement, and that he accordingly did, in the exercise of his judgment and discretion in that behalf construe the said term 'vacant land open to settlement' to *exclude land in the actual occupation of any person or persons under the local customs or rules of miners*, which said customs and rules are by statute incorporated into and become part of the laws of the United States; that the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of the laws relating to public lands; that in the exercise of this authority, it became and was his duty to make regulations to carry into execution the act of June 4, 1897, for the selection of lands included within the limits of the public forest reservation; *that in pursuance of such duty he did, under the direction of the Secretary of the Interior, by a form approved by the Secretary on March 9, 1899, make and establish a regulation for the execution of said law, which said regulation required that there should be submitted with the application to select an affidavit showing the lands selected to be non-mineral in character and unoccupied, and which said form of application was in force at the time when the attempted selections were made by the said Clarke;*

that the administration of the law relating to the selection of lands in lieu of lands included within the public forest reservation was wholly within the jurisdiction of the said Commissioner of the General Land Office under the direction of the Secretary of the Interior; that in the exercise of this discretion said Commissioner, in a proper proceeding for that purpose, passed upon and decided the right of the said selector, Clarke, to the land so selected, and that on appeal to this respondent as Secretary of the Interior, authorized and charged with the supervision of the public business relating to public lands, including mines, *this respondent held and decided that, by reason of the failure of the said Clarke to show in due and proper form that the said lands were at the date of said selection subject to selection as vacant lands open to settlement, the attempted selection thereof must be rejected;* wherefore it became and was unlawful for this respondent, as such secretary, or for the Commissioner of the General Land Office, acting under his direction, to order any patent or patents to the said lands to issue to the said Clarke as in the said petition prayed to be commanded."

THE ALLEGED REGULATION REQUIRING A NON-OCCUPANCY AFFIDAVIT.

The form, approved May 9, 1899 referred to, is set out in paragraph 8 of the petition (R. 7), and the portion relied upon by the defendant in error is also set out in paragaaph 2 of the answer (R. 122), as follows:

> "There are also submitted certificates from the proper office showing that the land relinquished, or surrendered, is free from encumbrance of any kind, also that all taxes thereon, to the present time, have been paid, and an affidavit showing the lands selected to be non-mineral in character and unoccupied."

This form had not been printed in any publication issued by the land department (See 28 L. D., 521, 523), and it

is alleged in the petition (Par. 17, R. 14) and admitted by the answer that, contrary to the custom of the land department where affidavits are required, no form of non-occupancy affidavit had ever been adopted or furnished by the land department for the use of the local land offices; that previous to May 4, 1898, the department had prescribed no form for selection under the act of 1897; and, after the issuance of the instructions of May 4, 1898, treated the recital of the filing of a non-occupancy affidavit as merely directory and not mandatory and *patented dozens of such selections in which no non-occupancy affidavit had been required or furnished.*

All that ever appeared in any publication of the land department on the subject was the following in the Circular of May 9, 1899 (28 L. D., 521), addressed to "Registers and Receivers of the United States Land Offices," viz., "*the forms of application (4-634) and (4-643), copies herewith, should be used in the classes of cases to which they respectively apply.*"

Unless this language—which gives no light to the public as to the contents of such form—together with the form itself, which recites that it is accompanied by a non-occupancy affidavit constitutes a valid regulation, then there is no such regulation, and none other is claimed.

A person intending to make a selection under such act would see such form of selection for the first time when he appears at the local land office to make his selection, and if then he is not presented by the local land officers with any non-occupancy affidavit for his signature, and his selection is accepted and entered of record, without requiring such an affidavit, and the register certifies that the land selected "is free from conflict and that there is no adverse filing, entry or claim thereto," as was done in this case, he would certainly be justified in supposing that no further affidavit was required of him.

We assert with the utmost confidence, that no regulation of the department requiring the filing of a non-occupancy affidavit as a part of a selection under the act in question *ever existed;* that if it had existed it would have been *void*, as enlarging the requirements of the statute, and imposing a burden and exacting a condition not authorized by the statute; and further, that even if such a regulation ever existed, and even if it were a valid regulation, the department by its practice in the administration of this statute has *waived its requirements*, and is by its own conduct estopped from exacting compliance with it in this case.

We ask the court's special attention to the exhaustive discussion of (1) *the existence*, (2) *the legality*, and (3) *the waiver* of this alleged regulation requiring this non-occupancy affidavit contained in appellant's brief in Equity Cases Nos. 217 and 218, argued herewith, on pages 135 to 167 thereof, and would like to have such discussion considered a part of this brief. But on the subject of the waiver of such alleged requirement by the previous practice of the department, we here call the court's attention to the fact—

First, that no non-occupancy affidavit was ever furnished by the land department to the local land officers, for use under this act, until more than a year and a half after these selections were made; and, second, that the practice of the land department (of which this court will take judicial notice) was not to require such affidavits, and the records of the land department show that hundreds of patents had been issued under this act before the decision in this case, where no such affidavits were required or filed, and that the majority of patents theretofore issued under this act, were of this character, and no selections had ever been rejected for lack of such an affidavit.

The fact is, that about the only selections under this act that were accompanied by affidavits containing a non-occu-

pancy clause, were a few in which such affidavits had been prepared and printed by private dealers in forest reserve lands, before the department's practice on the subject was established; and as it soon became well known that the government was not furnishing or requiring such affidavits and was issuing patents without such affidavits, it became the custom of such dealers to strike out the non-occupancy clause from their printed form of affidavit, just as was done in this case.

To exact such an affidavit for the first time, in this case, nearly a year and a half after Clark's selections were made, and to refuse to permit Clark to supply such affidavits later, as of the date of the selections, and to reject and cancel such selections on that ground—although the selected land was admittedly unoccupied when selected—is so obviously arbitrary and unlawful, as to need no further comment from us.

It is an axiom of English jurisprudence that "freemen can endure an unjust law, but an uncertain law, dependent upon arbitrary official rulings, is intolerable."

THE QUESTIONS PRESENTED BY THE MANDAMUS RECORD.

It thus appears, as admitted fact, that at the time of selection the land was non-mineral, wholly unoccupied in fact, and admittedly subject to selection, even under the defendant in error's attempted construction of the act of June 4, 1897, and that the sole ground of his refusal of patent is the alleged failure on the part of the selector to file at the time of selection a so-called non-occupancy affidavit; which ground of refusal the defendant in error attempts to justify upon the plea that in the exercise of what he called uncontrollable discretion he has construed the term "vacant" in the act to mean "unoccupied," and, by a mere recital in an unpublished form, established a

regulation making the filing of such non-occupancy affidavit a condition precedent to the operation of the statute; and there is no other question presented in the case.

And at the argument of the cause in the court of first resort, counsel for the defendant in error, in open court, confirmed this statement of the issue, saying (R., p. 133):

> "The issue in this case, if your honor pleases, is not an issue between the selector and the protestant or the contestant in any sense; it is an issue between the selector and the United States. The protestant is not in this court, in any way direct or indirect. He was not in the land department in respect to the matter which we have here to consider, except as a means of informing the United States that the land which the selector attempted to take under this act was not subject to be taken under that act."

As to the effect of the answer in binding the respondent to the defenses pleaded, the language of Mr. Justice Bradley (in U. S. *vs.* Payne, 30 Wash. Law Rep., 338) is pertinent.

Judge Bradley says:

> "It is not claimed that the *statute* in all its requirements has not been complied with. No part of the requirements of the *statute* is indicated as to which there has been non-compliance; but the record shows that the certificate of entry has been cancelled and the right has been revoked and the publication has been excluded from the mails for the *reasons*—and these are the only *reasons*—and as has been stated they must be held to be the *sole* reasons—that the principal feature of the publication is 'that of a reference book and not that of current news or miscellaneous literary matter.' The question of the failure to comply with the requirements that it should be 'current news or miscellaneous literary matter' has been disposed of by the decision *that the regulation imposing this additional requisition upon such publications is void* and is beyond the power of the Postmaster-General."

Taking this language with that contained in the West case, *supra*, that "the return should be an answer or statement of the facts showing the *grounds* upon which the respondent has acted or refused to act," and it is perfectly clear that the defendant will be confined to the "reasons" and the "grounds" given for his action in his answer.

In Barney *vs.* Dolph, 97 U. S., 652, 656; Simmons *vs.* Wagner, 101 U. S., 260, 261; Dibble *vs.* Land Co., 163 U. S., 63, 74, this court said:

> "Where the right to a patent has once become vested in a purchaser of public lands, it is equivalent, so far as the Government is concerned, to a patent actually issued. *The execution and delivery of a patent after the right to it has become complete are mere ministerial acts of the officers charged with that duty.*"

There is no question as to the soundness of the general rule laid down in Benson M. & S. Co. *vs.* Alta M. & S. Co., 145 U. S., 128, namely, that:

> "It is a general rule in respect to the sales of real estate that when a purchaser has paid the full purchase price his equitable rights are complete and there is nothing left in the vendor but the naked legal title which he holds in trust for the purchaser. And this general rule of real estate law has been repeatedly applied by this court to the administration of the affairs of the land department of the government; and the ruling has been uniform, that when in cash sales the price has been paid, or in other cases all the conditions of entry performed, the full equitable title has passed and only the naked legal title remains in the Government in trust for the other party, in whom is vested all the rights and obligations of ownership."

Applying this doctrine to the statute here under consideration (the act of June 4, 1897), it cannot be questioned that if an owner of lands "included within the limits of a

public forest reservation" relinquishes the same to the Government by a good title and selects "in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract relinquished," he has thus paid the full purchase price for the selected land and "all the conditions of entry are performed," and hence "the full equitable title is passed."

THE ACTION OF THE COURTS BELOW.

The court of first resort filed no opinion in the case, but merely entered an order overruling the petitioner's demurrer to the defendant's answer, and upon motion for rehearing adhered to such action and entered a judgment dismissing the petition.

THE COURT OF APPEALS HELD THE REQUIREMENT OF NON-OCCUPANCY PROOF UNWARRANTED.

The Court of Appeals in its opinion (R. 142), upon the authority of Whitney *v.* Taylor (158 U. S., 85), held that the land department had no authority to require a selector to accompany his selection with an affidavit to the effect that the land was non-mineral or unoccupied; thus overruling the defense pleaded by the defendant in error, and this, as we have shown, being the defendant in error's only defense, not only to reinstating the selections as cases pending before him, but as well to passing them to patent, the judgment of the Court of Appeals should have been a reversal of the judgment below with direction to issue the writ commanding the defendant in error to reinstate the selections and pass them to patent.

THE ERROR OF THE COURT OF APPEALS.

But the Court of Appeals, through misconception of the case presented by the pleadings, assumed that the protestants had made *entry* of the lands in question under the act of February 11, 1897, prior to the selection thereof by

Clarke (R. 142); that there had been a contest in the land department between the protestants claiming under the act of February 11, 1897, and the selector claiming under the act of June 4, 1897, that proof had been taken, and that, even though there may not have been a formal contest, the action of the defendant complained of was a final determination of the matter against the selector, and held that the court had no jurisdiction to control the discretion of the defendant in error in so disposing of the matter and affirmed the judgment of the court below, saying (R. 143):

> "Upon these authorities, it is very clear that, if there was here a contest between different claimants of the land, the land office had jurisdiction to adjudicate and determine the contest; and that, if there was no formal contest between rival claimants, yet it was still within the jurisdiction of the land office, in view of the protests that had been filed and of *the proof that was taken*, to determine whether the land selected by Clark was 'vacant land open to settlement.' If it decided the controversy erroneously, if it made a mistake in its definition of what constituted 'vacant land open to settlement,' if it attached undue value to the protests, if it failed to inform itself fully in regard to all the circumstances, yet, as the case was within its jurisdiction, such consideration cannot be inquired into or reviewed in a collateral proceeding, least of all, in a proceeding for the writ of mandamus, the use of which is limited to the enforcement of a merely ministerial duty and to the protection of a plain, admitted, and unquestioned legal right that has been arbitrarily or without due warrant of law denied."

The protestants never made any entry of, or application to enter, the lands in question.

As we have shown, the Court of Appeals unaccountably, in the face of the certificates of the local officers and the admitted allegations of the petition to the contrary, assumed

that the protestants, or some of them, had made *entry* of the lands under the act of February 11, 1897.

To "enter lands," as the term has been used in the public land laws from the beginning, is to purchase, or make application for, lands at the United States local land office.

Chotard *v.* Pope, 12 Wheat., 586.
Lockwitz *v.* Larson, 52 Pac., 279.
Sturr *v.* Beck, 153 U. S., 541, 547.
Dealy *v.* U. S., 152 U. S., 539, 544.
Hastings & D. R. Co. *v.* Whitney, 132 U. S., 357, 363.
Tarpey *v.* Nadsen, 178 U. S., 215.
Gilbert *v.* Spearing, 4 L. D., 463, 465-6.
Iddings *v.* Burns, 8 L. D., 224, 226.

> "An entry is that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his claim thereto with the proper land officers of the United States."
>
> Secretary Chandler to Commissioner Williamson, 2, Copps Pub. Land Laws, 1882, p. 869.

As entry can be made only at the United States local land office and no entry or application to enter was ever made by the protestants, it is evident that the Court of Appeals merely erred in supposing the record showed that an entry had been made, or else through unfamiliarity with the land laws and procedure thereunder, assumed that staking off a mining claim on the land or filing a notice of location of such a claim in the county recorder's office (not the United States land office) was an *entry*.

THE FILING OF NOTICE OF LOCATION IN THE COUNTY RECORDER'S OFFICE WAS A MERE NULLITY.

As we have shown in our opening briefs in this case and in Equity Cases Nos. 217 and 218, discovery is the *sine qua*

non to a valid mining location, and in the absence of lawful discovery the marking of boundaries and the filing of notice in the county recorder's office are ineffectual for any purpose.

A notice of location is not even evidence of any fact recited in it.

Magruder *v.* O. & C. R. R. Co., 28 L. D., 174.
McQuiddy *v.* State of California, 29 L. D., 181.
Elda. M. *v.* M. Co., 29 L. D., 279.
Harkrader *v.* Goldstein, 31 L. D., 87, 93.

The utmost effect of a notice of location on file in the county recorder's office could only be to *caveat* the public to examine the land to see if there had been discovery of mineral thereon which would validate the claim.

Here it is admitted that at the time of selection by the selector no discovery had been made on the land and that no one was even occupying or in possession of it. So that the alleged mining claims had no existence in law and the notices of location were mere nullities.

MR. JUSTICE WHITE'S INQUIRY OF MR. VAN NESS CONCERNING THE FOREST LIEU SELECTOR FINDING THE PLACER MINING LOCATOR'S MINING LOCATION OF RECORD IN THE COUNTY RECORDER'S OFFICE.

Upon the argument of the Equity Cases, Nos. 217 and 218, Mr. Justice White asked Mr. Van Ness if when the selector under the forest lieu land act came to the county recorder's office to place his deed of relinquishment to the United States of record, he would not find there the notices of location of the placer mining claims. The response to this was that the deed of the relinquished land would be recorded in the county in which the relinquishment was

situated, which might or might not be in the county in which the placer mining locations were recorded. It is wholly immaterial, however, whether the selector should find such placer mining locations of record or not, as they would not import notice of anything. Not being evidence they would not affect the presumption growing out of the Surveyor General's return that the land was agricultural in character. If valuable mineral deposits had been discovered on the land this fact would preclude a valid selection being made. It is, therefore, apparent that the selector's rights would depend, not upon the question as to whether the land was *claimed* for mining purposes, but solely upon the question as to whether or not valuable mineral deposits had been discovered upon the land.

Can the power of the Government to convey its own lands be lessened by unauthorized acts of third persons?

The law declares that no location of a mining claim shall be made until discovery of mineral deposits within the boundaries of the claim.

If one mark off a so-called mineral claim on public land of the United States, in which valuable mineral deposits have not been found, he violates the law. If he post notices of such location at the corners of such a tract he violates the law. And if he file such notices in the county recorder's office he violates the law. Do these several violations of the law diminish the power of the United States to convey to others lands so claimed? If, by reason of these so-called claims no one can buy the public land, it follows that the Government's power to sell is thus extinguished. This cannot be.

Mineral locations cannot be, and are not in law, upheld by any theory, however strong, of the presence of minerals, nor by the actual undiscovered mineral character of the land.

Dughi *v.* Harkins, 2 L. D., 721.

Davis *v.* Wiebold, 139 U. S., 507.

All indications of mineral are so delusive and theories so misleading that the law accepts no land as mineral until it is demonstrated to be mineral by the actual discovery or production of valuable mineral. In other words, courts do not rest their judgments as to the character of land on hypotheses, hopes, fears, or beliefs, but only on known facts in being.

THE FILING OF THE PROTESTS DID NOT INITIATE A CONTEST.

The Court of Appeals, apparently through unfamiliarity with the procedure of the land department, assumed that the mere filing of the protests initiated a contest, but later, being doubtful about this proposition, qualify it by saying that if there was no formal contest the result is the same.

That the mere filing of the protests did not and could not initiate a contest is apparent upon reference to the rules of practice of the land department set out on pages 20 and 21 of our opening brief.

See also Travis against Perry, 15 L. D., 23, 25; where it is said:

> "But in this case there was no contest for him to appear to, for the filing of an affidavit of contest without action thereon by the proper authority, does not constitute a pending contest."

THE PROTESTANTS WERE RECOGNIZED BY THE LAND DEPARTMENT MERELY AS INFORMERS.

The protestants here, however, were not recognized by the land department as claimants desiring to contest but as mere informers.

See admission of counsel for defendant in error in the argument in the court of first resort. (R. 133), quoted by us *supra*.

A clear definition by Mr. Justice Brewer of the status of a protest will be found in Wight *v.* Dubois (21 Fed., 694).

The titling of papers in the matter of the selections, as Kern Oil Co. *et al. v.* C. W. Clarke or C. W. Clarke *v.* Kern Oil Co. *et al.*, has no significance as indicative of a pending controversy, but is merely in accord with the practice of the land department with respect to titling cases in which protests are filed.

As we have shown, the protests were filed upon the theory that if the lands could thereafter be shown to be valuable for deposits of petroleum they would be mineral in character and, therefore, not subject to selection; and the prayer of the protests is that a hearing be ordered to determine the character of the land.

While two of the protests also pray that it be adjudged that the protestants are the owners of and in possession of the land, and that it was withdrawn from entry under the act of June 4, 1897, and also use the terms contest and contestants interchangeably with protest and protestants, it is to be observed, as we have said, that the validity of possessory mining claims depends upon discovery and known existence of valuable mineral deposits (O'Reilly *v.* Campbell, 116 U. S., 418; King *v.* Amy & Silversmith Cons. M. Co., 152 U. S., 522); and if the validity of the selections depend upon the non-petroleum character of the land a determination that the lands were known to be valuable for petroleum at the time of selection would dispose of the selections through their own inherent weakness without regard to the existence or validity of alleged possessory mining claims. In other words, the material fact is the known mineral or non-mineral character of the land, which is a question between the Government and the selector, and a protest filed by a claimant of a possessory right has no greater standing than one filed by a stranger

to the land, who calls its alleged mineral character to the Government's attention.

Accordingly, the Commissioner treated the protestants as mere informers admonishing the Government as to the alleged mineral character of the land, and evidently regarding the showing of the protests as insufficient to invoke action by the department against the selections, and desiring to be fully informed as to the situation, caused an investigation to be made by a special agent on behalf of the Government, whose report is held secret in the department, and

The Commissioner did not allow or order a contest based upon the protests, but ordered proceedings initiated on behalf of the Government based upon the special agent's report.

As will appear from the closing paragraphs of the Commissioner's decision (R. 71), the action taken by him was not under the rules of practice relating to contests, which we have quoted, but under the rules regulating proceedings instituted by the Government against entries or selections, which rules are as follows (Instructions of August 18, 1899, 29 L. D., 141):

> "To Registers and Receivers of United States District Land Offices.
>
> "Gentlemen: The following rules are prescribed for the government of all parties concerned in proceedings arising on reports of special agents affecting the validity of claims to public lands, viz.:
>
> "1. Hereafter, when there is filed in this office a report of a special agent alleging that a certain entry, filing, location, or claim for a specified tract of public lands, is fraudulent, or illegal, or that the claimant has failed to comply with the requirements of law, and the facts presented are sufficient, if true, to warrant the cancellation of the entry or claim, the proper local officers will be promptly advised thereof, and will be directed to serve notice upon

the entryman or claimant in the following manner:

"2. The notice must specifically define the charges contained in the special agent's report adverse to the entry, filing, location, or claim; and the entryman or claimant shall be advised that he will be allowed thirty days within which to apply for a hearing, and that a failure to apply for such hearing within the prescribed time will be taken as an admission of the truth of the charges.

"3. Said notice must be served personally, or, in cases where evidence is submitted to this office showing that due diligence has been used by the local officers and the special agent, and the party or parties cannot be found, notice by publication, in accordance with Rules 13 and 14 of Practice, may be specially authorized and directed by this office.

"4. If the entryman or claimant applies for a hearing the local officers will promptly forward the application to this office when, at as early a day thereafter as practicable, a special agent will be assigned to represent the Government at the trial, and the local officers will be directed to confer with him and agree upon a day therefor, of which they will duly notify all parties in interest, and otherwise proceed as provided by the rules of practice governing contest cases.

"5. Upon the termination of the hearing (*at which the burden of proof will be assumed by the Government*) the local officers will, without delay, make their finding and recommendation in the case, duly notify the defendant thereof as in other cases (Rule 44, Practice), and, upon the expiration of the time allowed for appeal, transmit the record to this office.

"6. In cases where the entryman or claimant, after due notice, fails to apply for a hearing within the time allowed, the local officers shall, at the expiration of the prescribed time, render decision as in other *ex parte* cases. The failure of the entryman or claimant to answer to the charges shall be taken as an admission of their truth, obviating the necessity of submitting evidence in support thereof.

"7. Notice of such decision shall be given the entryman or claimant by the local officers as in other cases (Rule 44 of Practice), allowing the usual time for appeal. If, at the expiration of the time allowed no appeal has been filed, the case shall be transmitted to this office to be disposed of in the same manner as other *ex parte* cases.

"8. Hereafter no entry, filing, location, or other public land claim will be canceled upon allegations contained in a special agent's report, except upon proper evidence that the entryman or claimant had notice of the charges against the same, either by personal service of notice or after due and proper notice has been given by publication under Rules 13 and 14 of Practice.

"9. Instructions of November 4, 1895 (21 L. D., 367), relative to hearings ordered upon special agents' reports will remain in full force and effect where not in conflict herewith, but all instructions relative to any proceedings upon special agents' reports inconsistent herewith are hereby recinded.

"10. All notices to be served on entrymen or claimants under these instructions must likewise be served on transferees or mortgagees, where such transferees or mortgagees are of record as parties in interest in the local land office or in the General Land Office."

THE PROCEEDINGS ORDERED BY THE COMMISSIONER WERE NOT INSTITUTED, HOWEVER, BECAUSE HIS ACTION WAS SUPERSEDED BY APPEAL THEREFROM TO THE SECRETARY.

As we have shown, the action of the Commissioner in ordering proceedings instituted was based upon the erroneous theory that discovery of mineral subsequent to selection and before approval by him, would defeat the selections, and, as the affidavits filed by the protestants

failed to show discovery at or previous to the selections, and as the special agent could not, in the face of the well-known facts to the contrary, be presumed to report that valuable deposits of petroleum had been discovered in the lands at or prior to selection, the selector appealed to the Secretary, and, under the rules of practice of the department, such appeal operated as a supersedeas of the Commissioner's action in ordering proceedings instituted on behalf of the Government; and the question presented before the Secretary was whether subsequent discovery could affect the selections, and, if not, whether, in view of the palpable insufficiency of the protests, and being presumably in possession of the true facts through the report of its special agent, the Government could or should institute proceedings against the selections.

THE COMMISSIONER DID NOT "PASS UPON AND DECIDE THE RIGHT OF THE SELECTOR TO THE LANDS SELECTED" AS STATED IN PARAGRAPH 10 OF THE DEFENDANT'S ANSWER.

As the decision of the Commissioner appears in full in the record and shows that the action of the Commissioner was limited to directing charges to be preferred against the selections, as we have shown, and as the defendant in paragraph 5 of his answer (R. 124) alleges that the Commissioner decided that the allegations made in the protests should be investigated at a hearing to be conducted in accordance with the following principles, etc., it is apparent that this later allegation in the answer is a mere inadvertness or at most an erroneous conclusion inconsistent with the previous allegation and not an allegation of fact well pleaded, even were the point material.

That the land department cannot adjudicate the character of land upon *ex parte* affidavits is declared by R. S. 2335:

> "All affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land office. *In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided on personal notice of at least ten days to the opposing party;* or if such party cannot be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land office as published nearest to the location of such land, and the register shall require proof that such notice has been given."

and, under the practice of the land department, every controverted question of fact is sent to the local officers for a hearing.

NO PROOF WAS TAKEN IN THE LAND DEPARTMENT.

The Court of Appeals assumes and states in its opinion that *proof* was taken in the land department and here again plainly erred in supposing that the record showed that a hearing before the local officers had been had, in which testimony had been taken, or else, through unfamiliarity with the limitations upon the powers of the land department and the necessity of due process of law in determining issues of fact by formal hearings before the local officers, supposed that mere *ex parte* protests and affidavits were *proof* upon which the land department could lawfully adjudicate the rights of adverse parties.

The land department is as much bound by the rules of evidence as the courts, and cannot destroy a vested right secured by entry or selection without due process of law, which, under its rules of practice to which we have referred, consists of the service of a notice in the nature of an information or indictment and a trial or hearing before the local officers where witnesses are examined and cross-examined.

The protests and affidavits were, as we have shown, mere *ex parte* communications to the Government required by the rules of practice to be sworn to as an assurance of good faith.

Ex parte affidavits are mere hearsay (1 Enc. Pl. and Pr., 335).

The *quasi* judicial functions of the land department in determining issues of fact cannot be exercised upon *ex parte* affidavits. As said in *ex parte* Sutley, 3 L. D., 248-250:

> "*An affidavit is not evidence; it is merely a formal assurance of good faith on the part of the affiant,* while a deposition, properly taken, is as much the evidence of the deponent as though he were in the presence of the court, and there subjected to an oral examination. *Thus an affidavit,* whether appearing in the verification to a pleading, or in support of an interlocutory proceeding, *is not, in fact or by intent, effective so far as the final judgment is concerned; but upon the matters appearing in a deposition the final judgment may safely rest.*"

The Secretary did not and could not, upon the case presented by the appeal from the Commissioner's action, determine that the lands in question were not vacant lands open to settlement at the time of selection.

He determined no controverted question of fact adverse to the selector, and, as we have shown, could not do so upon the record before him, but acted solely upon the

record of the selections supplemented by the *uncontroverted* fact that after the selections by Clarke the protestants had gone into possession of the lands and made discovery of petroleum therein, and, instead of deciding that Clarke's record title was destroyed by conditions *dehors* the record at the time of selection, as the vague language of the Court of Appeals would seem to imply that they assumed, the defendant in error merely decided that Clarke had not acquired a record title, because the record itself was fatally defective in not containing accompanying non-occupancy proof.

THE SECRETARY DID NOT EXERCISE, AND DOES NOT PLEAD THAT HE EXERCISED, QUASI-JUDICIAL FUNCTIONS IN DETERMINING ANY QUESTION OF FACT AFFECTING THE SELECTIONS.

The Court of Appeals erroneously assumed that the defendant in error pleads that the land department adjudicated the character of the land adversely to the selector, but, as we have shown, the selections came before the defendant in error upon the question of whether or not the department should prefer charges against them and raise an issue of fact and thereby invoke the *quasi*-judicial function of the local officers to hear and determine the matter so put in issue.

The Court of Appeals failed to distinguish the administrative function of the land department from its *quasi*-judicial function. The department acts *administratively* in determining whether charges shall be preferred and its *quasi*-judicial jurisdiction does not attach until a *case* is presented by service of a notice of charges upon the entryman or selector. This notice is the jurisdictional authority corresponding to the original writ at common law.

The defendant in error, however, acting administratively and not judicially, inspected the record, supplemented by the uncontroverted fact of subsequent discovery of petroleum, and rejected the selections for a supposed fatal defect in the selector's record of selection, and this is the only defense he pleads and the only reason he offers for refusing to order the cases to patent.

The Court of Appeals held that the requirement of proof of non-mineral character and non-occupancy was without warrant of law, and so disposed of the sole ground of the defendant in error for rejecting the selections. They say, however, that it became the right and probably was the duty of the land office to investigate the condition of the land and to ascertain whether such condition remained in fact what it purported to be on the records of the office, and apparently assume that an investigation of the character of the land was made and that an adjudication adverse to the selector resulted.

It is apparent that the Court of Appeals merely erred in their understanding of the proceedings in the land department, or else assumed that the action of the defendant in error in rejecting the selections for an unwarranted reason was *res judicata* of every question which might have been adjudicated by the land department. As we have shown that the selections had not reached a stage where the condition of the land had been put in issue, and that the question presented to the defendant in error was the administrative one of whether the condition of the land should be put in issue for adjudication, it is apparent that if the Court of Appeals attempted to apply any supposed doctrine of *res judicata* they failed to see that jurisdiction in the defendant in error to determine any issue of fact against the selector did not exist upon the record before him, and could not arise until there should be charges preferred against the selections, a hearing of the issue before the local officers, a

decision by them, an appeal to the Commissioner, and ultimately an appal from him to the Secretary.

THE REMEDY.

We maintain that the pleadings in this mandamus proceeding clearly show that Clarke, petitioner's grantor, had fully complied with the statute, and had acquired the complete equitable title to the selected lands, and that the right to a patent was fully vested; but such patent was arbitrarily withheld by the Secretary of the Interior upon the sole ground that Clarke did not at the date of his selection comply with the provisions of an alleged regulation, which is absolutely void, and we submit that in such a case mandamus will lie.

We understand the law to be in full accord with the views of the Court of Appeals of this district expressed in the recent case of West *v.* Hitchcock, 30, Washington Law Reporter, 186, namely, that—

> "The fact that the act which mandamus seeks to compel is the culmination of a series of proceedings, or is of a judicial or *quasi*-judicial nature, or is an act in the course of such proceedings, does not exempt it from judicial control by the courts through the writ of mandamus *when the officer or person charged to perform it arbitrarily and without just legal cause refuses such performance.*"

In that case *approval* by the Secretary of the Interior of a selection of land was involved. In this case, the *patenting* of a selection of land is involved. The acts in each case are equally ministerial, if the *right* of the party is equally clear.

We call the court's attention to the recent decision of the Court of Appeals of this district in the case of National Railway Pub. Co. *v.* Payne, Postmaster General, 30, Wash. L. R., 791, wherein it was held that mandamus would lie

against the head of a department whenever it appeared that a party had fully complied with all the requirements of the statute, and that his plain statutory rights were denied him merely on account of his non-compliance with a void departmental regulation exacting requirements not imposed by the statute.

In the course of the opinion, page 793, the court says:

> "The citizen who desires to have his publication carried in the mails of the United States as second class mail matter and who has fully and fairly complied with all the requirements of the statute in regard thereto, has acquired a positive legal right to have it so carried; and his right will be enforced by the writ of mandamus if the Postmaster General *arbitrarily or without valid legal reason* refuses to receive or transmit such publication."

And as showing the almost exact identity between that and the present case, the following language used by the court, on pages 793 and 794, is pertinent, namely:

> "It is conceded that the relator has complied with all the requirements of the *statute*, and that the characteristics of the publication are literally and specifically as therein prescribed; and it appears that the exclusion of the periodical from the mails as second-class matter is based exclusively, and in express terms, upon its failure to comply with the superadded requirement of the *Postal Regulation* that it must consist of 'current news.' Under the doctrine of * * * Roberts *v.* United States, 176 U. S., 221; American School of Magnetic Healing *v.* McAnnulty, decided by the Supreme Court of the United States November 17, 1902; U. S. *v.* Hitchcock, 19 D. C. Appeals, 233, and other cases, we must hold that the ground of exclusion is insufficient in law, and that the relator is entitled to the writ of mandamus for the enforcement of its rights in the premises."
> (Stars represent cases omitted."

The case of American School of Magnetic Healing *v.* McAnnulty, recently decided by this court, is relied upon by the Court of Appeals as justifying and controlling its decision in that case, and properly so; for, although that was injunction and not mandamus, the scope of the two proceedings against the head of a department is the same; the remedies of injunction and mandamus being correlative and co-extensive—whenever one will lie to *restrain* action, the other will lie to *compel* action.

In the McAnnulty case this court, in speaking of the action of the Postmaster-General in determining what should be admitted as second-class mail matter, says:

> "His determination that those admitted facts do authorize his action is a clear *mistake of law* as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual."

The present case is almost identical with the Payne case in all material respects, as the petition for mandamus alleges and, by not denying, the answer of the Secretary admits, that Clarke had fully complied with the terms of the statute by which the Government became bound to issue to him a patent for the selected land, namely, that he had conveyed to the Government perfect title to his land within the limits of a forest reserve and in lieu thereof had selected the land in controversy and that such land when selected was such as the statute offered, namely, "vacant land open to settlement." It is specifically alleged, and not denied, that the selected land when selected was open on the books of the local land office, returned as non-mineral in character, and that no mineral had ever been

discovered thereon, and that the same was actually unoccupied. The only ground given for cancelling the selections and denying the patent, is that the selector did not at the time of selection make affidavit as to the admitted fact that the selected land was then unoccupied. The analogy between the Payne case and the present case is most striking, and since the District Court of Appeals held with us that the requirement by the Secretary of such non-occupancy affidavit was unlawful, and as the absence of this affidavit is the sole ground relied upon by the Secretary for cancelling Clarke's selections, it must be apparent that the Court of Appeals plainly erred in not reversing the court below and ordering patent to issue.

Equitable title vests at the date of selection, under the act of June 4, 1897, whether the selector's relinquishment of his forest reserve land be contemporaneous with his selection—as the act of Congress contemplates—or prior thereto, as made necessary by land office regulations.

We claim that the act of June 4, 1897, is an offer of *contemporaneous* exchange of properties, in which the selector should not be required to relinquish his forest reserve land in advance of his selection of the lieu lands offered him by the Government; and we insist that the selector is entitled to know at the very time of making his relinquishment what specific lands he is to get in exchange for his relinquished lands; and we hold that this offer of exchange contemplated not that owners of forest reserve land should trade "sight unseen," or by "a pig in a poke," or get a floating right to select *some* vacant land open to settlement *somewhere*, but that they might be, and would be influenced, guided, and even controlled in making their relinquishments by a knowledge of, and the certainty of obtaining the specific lands they were to get in lieu thereof. As said by the Circuit Court for the Ninth Circuit in Olive Land and Development Co. *v.* Olmstead, 103 Fed., 568:

> "In all cases the land authorized to be selected in lieu of that relinquished is required to be vacant and open to settlement. When? Manifestly at the date of selection. *It is upon its then character and condition that the selector has the right and is bound to act. Before making his selection he must inform himself of the character and condition of the tracts desired;* but it would be wholly unreasonable to say that he is required to make a selection based upon what may be disclosed in that regard in the future."

This clearly shows that the relinquishments and selections contemplated are contemporaneous; but, say our adversaries—both upon the oral argument and in the briefs—this view, and the conclusions drawn from it, must fail, for the reason that, in the practical administration of this act by the land department, the relinquishments to the Government are in advance of the selections, and hence, not being contemporaneous, the equitable title does not vest at the date of selection, as we claim.

This argument is not sound. The rights of a purchaser, while they may not be any better by the payment of the purchase price in advance, are certainly no worse than by his contemporaneous payment. We do not claim that the equitable title vests at the date of the relinquishment, if the relinquishment precedes the selection, but that both relinquishment and selection are required to constitute compliance with the statutory offer of exchange, and until both acts are completed the exchange is not completed, and it is only then that the equitable title vests.

When both acts called for by the statute are consummated, however, certainly the completion of the exchange is not deferred, nor the vesting of the equitable title postponed, because the selector, by his prior relinquishment, has been compelled to pay the purchase or exchange price in advance. In the merchantile world, generally, advance payment of purchase price, instead of being a detriment to

the purchaser, is accounted an advantage which usually entitles him to a discount in price; and, while we are not contending for any such advantage by prepayment here, certainly a selector's rights are not thereby prejudiced.

THE DEPARTMENTAL REGULATIONS ALONE RESPONSIBLE FOR RELINQUISHMENTS IN ADVANCE OF SELECTIONS.

By rule 16 of the regulations of the land department under the act of June 4, 1897, it is provided, as follows:

> "16. Where final certificate or patent has issued it will be necessary for the entryman or owner thereunder to execute a quit claim deed to the United States, have the same recorded on the county records, and furnish an abstract of title duly authenticated showing chain of title from the Government back again to the United States. The abstract of title should accompany the application for change of entry, which must be filed as required by paragraph 15, without the affidavit therein called for."

See 24 L. D., page 592, 593.

It will thus be seen that the department requires one having the perfect title to lands in a forest reserve, to divest himself of such title by a relinquishment placed of record in the county recorder's office, before he is permitted to make his selection in lieu thereof. The placing of the selector's deed of record vests the legal title to the relinquished land in the United States beyond the selector's power of recall; and it is only by an act of Congress that such title can be re-obtained.

Under this regulation of the department a selector is required to part absolutely with the entire consideration for the selected land—that is to pay in advance the full purchase or exchange price—before he can be allowed to make the selection authorized by the statute.

The department has thus closed the door to the contemporaneous exchange of properties contemplated by the statute, and made it absolutely necessary that the owner of forest reserve lands should relinquish such lands to the Government before making his selection of lieu land.

Under the Department's administration of this act, a selector may pick out a particular piece of land which he wishes to select, and may with all haste, send his deed of his relinquished land for record in the proper county, and order his abstract of title brought down showing that he has conveyed a good title to the Government, and yet before he can get back such deed, and abstract of title, and deliver the same to the local land office, and select the tract which he had chosen in his own mind in lieu thereof, such tract may have been selected by some one else, and the real inducement to the transfer may be thus lost, without any fault of the selector.

Because the department by this arbitrary rule has defeated *pro tanto* the efficiency of the act, and rendered contemporaneous relinquishments and selections impossible, certainly a selector's rights—after he has made a selection of land—should not be prejudiced or postponed because of this departmental exaction. Recognizing the hardships of this rule, the department for a long time and until March 6, 1900 (see instructions 29 L. D., 578), permitted owners of forest reserve lands to convey such lands to the Government in large tracts, and to place the deed therefore of record and furnish an abstract of title therefor, and deliver the same to some local land office and thereafter to select, from time to time, lands in lieu of designated portions thereof, each selection referring to the deed of relinquishment and abstract of title theretofore furnished to the Government. By this means, although the owner of forest reserve lands was required to relinquish his lands in advance of his right of selection of lieu lands, yet he was

thereby enabled to hunt up lands he wished to select as lieu lands, and after finding the same, he could select at once, without losing time in sending his deed of relinquishment for record and getting an abstract of title, and running the risk of losing the desired land by having some one take it in the meantime.

This exaction of the land department compelling relinquishments to precede selections, contrary to the requirements of the statute, certainly cannot be urged as a ground of postponing the taking effect of selections, when once made, or as a reason why the selector's title should be exposed to attacks by third persons, or endangered by subsequent mineral discoveries.

The rule of the department requiring all relinquishments to be placed of record in the office of the county recorder of the county in which the relinquished land is located estops the land department from claiming that there has been no delivery of the deed until the department's approval thereof.

Placing the deed of record as directed by the above quoted departmental regulation, operates to vest the legal title of record in the United States; whether the selector ever makes selection of lieu lands or not, and only an act of Congress can revest such title in the grantor, and it certainly does not lie in the mouth of the department to say that there has been no delivery of a deed—the legal effect of recording which has transfered the record title to the United States—such recording having been done under a mandatory departmental regulation.

It was said by Mr. Chapman in the oral argument, that as there is power in the department to *accept* deeds of relinquishment to the United States, the department must have power to *reconvey* such title, if need be. The department, however, in the case of Tevis, 29 L. D., 275-77, held otherwise in the following language:

> "There is no statute under which title so relinquished or reconveyed to the Government can be returned or restored to the party making the relinquishment or reconveyance; that is to say, such a contingency or situation is wholly unprovided for in the existing legislation."

And yet the department exacts relinquishments of record in advance of selections, thus exposing a selector to the possible loss of the only tract of land for which he would have willingly traded his forest reserve land.

COUNSEL'S CONCESSION THAT AFTER THE EQUITABLE TITLE HAS VESTED, NO SUBSEQUENT DISCOVERY OF MINERAL CAN IMPAIR OR AFFECT SUCH TITLE.

It will be remembered that Judge Chapman, upon oral argument of this case, and upon the argument of the equity cases, numbers 217 and 218, distinctly stated that he did not claim that a subsequent discovery of mineral could in any wise impair or affect an equitable title once vested.

The decisions are so overwhelming to this effect that we have never understood how opposing counsel in these cases could have claimed otherwise, and yet we have always considered that they did claim otherwise until this concession was made upon the oral argument of this case. We consider this concession fatal to the claims of our adversaries, as it necessarily rests their whole contention upon the soundness of their other position, announced upon the oral argument and prominently set forth in both their mandamus and equity brief, namely:

The claim that equitable title to public land never vests until there has been an adjudication or determination by the land department that it has vested.

On page 43 of our adversaries' brief in this case it is stated:

> "The authorities are numerous and uniform that under every kind of law for the disposition of the public lands, no title, legal or equitable, vests until the application is passed upon by this special tribunal [the land department] and it has been determined that the party making the application possesses the qualications and has done the things which the law requires of him, and has paid the purchase price."

Other statements to the same effect will be found on pages 47, 48 and elsewhere throughout the brief.

In the brief of our opponents in the equity cases numbers 217 and 218, at the bottom of page 77 and the top of page 78, after reviewing the numerous decisions holding that the land department has jurisdiction until patent issues, to determine as to whether or not the law has been complied with, and as to whether or not title to a certain piece of land should issue a resume of all the points decided by such cases is given, and it is said, that such cases hold

> "*That an equitable title does not pass ever until there has been a decision of that special tribunal upon these questions, and it has been determined that the applicant possesses the qualifications of a purchaser, that he has complied with the terms of the statute and that the lands which he seeks to purchase are of the class that he is entitled to purchase*"

And again on page 104 of the same brief, after quoting some of our strongest cases holding that only mineral "*known at the time of the sale*" can be taken into consideration in determining the character of land, Mr. Chapman concludes with the following startling *non-sequitur*, viz.:

> "*And from the cases already cited and many others, it follows that it is not until there is this judgment of the land department that the lands are of the character sought to be purchased or selected that any title passes.*"

We submit that these conclusions of counsel in no wise follow from the authorities from which they are drawn, and that they are absolutely and fundamentally unsound, as they make the vesting of equitable title depend not upon *paying the purchase price, or other full compliance with the law upon the part of the applicant*, but upon some action of the officers of the land department, such as the issuance of a certificate, or a receipt, or some other paper intended only as *evidence* that the equitable title has passed; whereas the decisions of this court and the land department are innumerably holding that *it is payment of the purchase price or other full compliance with the law upon the part of the applicant that vests the equitable title*, and we challenge counsel to furnish a single case holding that it is the finding or judgment of the land department, or the issuance of a certificate or receipt or any other paper by the land department—as distinguished from paying the purchase price or other compliance with the law—that vests such title; and while it is customary that some such certificate or receipt of the land department issue where the party has paid the full purchase price or otherwise fully comply with the law, yet the issuance of such a certificate or receipt does not *pass* the equitable title. It is only a convenient *evidence* that such title has passed. It is the *act of the party* in full compliance with the act of Congress, and not the *act of the land officers* that *passes* the equitable title.

The decisions are all to this effect. The true doctrine is correctly stated by this court in the case of Benson M. & S. Co. *v.* Alta. M. & S. Co., 145, 128:

> "It is a general rule in respect to the sale of real property that when a purchaser has paid the full purchase price his equitable rights are complete, and there is nothing left in the vendor but the naked legal title, which he holds in trust for the purchaser; and this general rule of real estate law has been

> repeatedly applied by this court to the administration of the affairs of the land department of the government, *and the rule has been uniform that whenever in cash sales the price has been paid, or in other cases all the conditions of entry performed, the full equitable title* HAS PASSED, and only the naked legal title remains in the government in trust for the other party in whom is vested all the rights and obligations of ownership."

To the same effect see:

Simons *v.* Wagner, 101 U. S., 261;
United States *v.* Hughes, 11 Howard, 568;
Stark *v.* Starrs, 6 Wallace, 414;
Worth *v.* Branson, 98 U. S., 118;
Carroll *v.* Safford, 3 Howard, 414;
Witherspoon *v.* Duncan, 4 Wallace, 210;
Deffeback *v.* Hawke, 115 U. S., 392;
Colorado Coal & Iron Co. *v.* U. S., 123, U. S., 307;
Davis *v.* Wiebold, 139 U. S., 524.

As applicable to this particular statute, the fact that the equitable rights of a selector depend entirely upon his compliance with the law, and not upon any action of the land department, could not be more clearly stated than is done in the case of McDonald, 30 L. D., 124, where it is said:

> "By his deed of relinquishment and reconveyance to the United States of his own lands, situated within the boundaries of a forest reservation, and by his selection of the lieu land McDonald accepted the standing offer or proposal of the government contained in the act of June 4, 1897, and complied with its conditions, *thereby converting the mere offer or proposal of the government into a contract fully executed upon his part*, and in the execution of which by the government he had a vested right. After McDonald had fully complied with the terms on

> which the government by its act had declared its willingness to be bound no act of either the executive or legislative branch of the government could divest him of the right thereby acquired."

The case of Clark *v.* Northern Pacific R. R., 30 L. D., 145, is to the same effect. There the Secretary of the Interior says :

> "If the land selected by Clarke was subject to selection at the time he made selection thereof, and if, as appears to have been the case, the lands embraced in his deeds of relinquishment and deed of conveyance were proper bases for his selection, *he acquired at the time of filing such selections and deed of relinquishment and reconveyance, vested rights in the execution by the government of its part of the contract for the exchange of lands.*"

We have not been able to find a single decision, either of the department or of the courts, sustaining counsel's view that the equitable title does not vest until the department has decided that it has vested.

In Hussman *v.* Durham, 165 U. S., 144, 148, it is clearly pointed out that the equitable title to public land passes not by virtue of any certificate or receipt issued by the land department, but by virtue of the applicant paying the purchase price thereof.

The case holds that land is subject to State taxation whenever the complete equitable title has passed from the United States, but holds that the location of a forged bounty land warrant (although the equivalent of a final receipt) passed no title, but that the equitable title passed by the later payment of the purchase price authorized by act of Congress.

The court says :

> "In other words, the United States does not part with its rights *until it has actually received payment*, and if by mistake, inadvertence, or fraud, a certificate of location (which is the equivalent of a receipt) is issued, *when in fact no consideration has been received, no equitable title is passed thereby;* and a conveyance of a legal title does not operate by relation back of the time *when the actual consideration was paid.*"

In Carter *v.* Ruddy, 164 U. S., 495, it was held that the certificate of the officers of the land department was only "evidence" of an equitable title ; making it clear that the certificate itself does not *pass* the equitable title, but is only a convenient evidence thereof.

In this very case, the Secretary of the Interior, acting through the learned Assistant Attorney General for the Interior Department who signs the brief for the defendant in error here, held to the contrary in the following language:

> "That where a person making selections under the act of June 4, 1897, has complied with all the terms and conditions necessary to entitle him to a patent to the selected land, he acquires a vested interest therein, and is to be regarded as the equitable owner thereof."

And yet so great is the desire of the Honorable Secretary to sustain that portion of his opinion which holds the making of a non-occupancy affidavit a condition precedent to the vesting of the equitable title, that the chief law officer of his department is now willing to sign a brief which holds that equitable title does not vest by the act of the party which constitutes full compliance with the law, but solely by virtue of some act of the department. The same lack of candor, or at least inconsistency, is again shown by the frequent citation in the brief of the case of Spratt *v.* Edwards, 15 L. D., 290, 292, whereas the learned Assistant Attorney-

General for the Interior Department sitting for the Secretary of the Interior in the argument of the present cases before that department, said:

> "That is not a decision which I care to follow at all, and we do not follow it. I have not any respect for that decision. It was written by a gentleman who does not know anything on earth about mineral land, whatever he may know about anything else."

But even if some action of the land department be required, such as the issuance of a receipt or a certificate, as evidence that equitable title has vested, this does not help the defendant in error here, as the Register and Receiver of the local land office, allowed and regularly entered these selections on the books and plats of the local land office, and the Register gave his certificate that the land selected "is free from conflict, and there is no adverse filing, entry or claim thereto."

In homestead and preemption cases, the final receipt which has always been taken as evidence that the equitable title had vested, is issued by the local land officers, and not by the Secretary of the Interior or the Commissioner of the General Land Office; and actions of ejectment in most of the States of the Union will lie based upon this final receipt of the Receiver of the local land office in homestead and preemption cases, and yet an even more formal certificate from the Register in these cases is ignored by the Secretary as though it did not exist.

THE HARRELL & CULVER CASES.

In the case of A. J. Harrell, 29 L. D., 553, referred to by our opponents as holding that a selector's rights under the act of June 4, 1897, are fixed at the time of the approval of his selection by the Commissioner, is not a holding that the selector's rights *were not fixed prior to the*

Commissioner's approval. The department was not called upon in that case to pass upon the character of rights acquired prior to the Commissioner's approval, for the reason that such approval had already been had in that case prior to the happening of the occurrence which it was claimed adversely affected the selector's rights; and it was sufficient to say in that case that the selector's rights could not be affected by anything occurring after the approval of the selection. When the department was called upon later to determine the character of a selector's rights acquired before the Commissioner's approval, it held, in the McDonald and Clarke cases above cited, that the selector's rights became fixed and vested, and the contract of exchange wholly executed by him, whenever he had made his relinquishment and selection as required by the statute.

The case of United States *v.* Culver, 52 Fed., 81, is principally relied upon by defendants as supporting their view that the *belief* of a non-mineral claimant as to the mineral character of land affects the right of such claimant to make entry of the land.

We call the court's attention to the fact that in such case it is expressly stated that the land, as to which the patent was set aside, *was known to be mineral at the time the original homestead entry was made.* Counsel's argument in relation to this case seems to be based upon the statement also contained in this decision, that mining experts had expressed the opinion that the land was mineral. This, however, does not weaken the further statement that the land was *known* to be mineral. If the court intended to go as far as our adversaries claim it did, then the case is badly decided, and is squarely in conflict with the express views of this court in I. S. M. Company *v.* Reynolds, 124 U. S., 374; Sullivan *v.* I. S. M. Co., 143 Id., 431; Colorado Coal Co. *v.* U. S., 123 U. S., 307; Deffebach *v.* Hawke, 115 U. S., 399; Davis *v.* Wiebold, 139 U. S., 507; of

Judge Ross, in the Olive L. & D. Co., case, 103 Fed., 578.

If the court in the Culver case was influenced in its decision by the fact that it was apparent that the homesteader acquired the land, not for homestead purposes but for its mineral value, its judgment might be reconciled with the homestead statute, section 2390, which requires the homesteader to make affidavit that "his entry is made for the purpose of actual settlement and cultivation."

The purpose or motive of the homesteader in making homestead entry being thus made by statute an element in his right of entry, it was not improper for the court to take such purpose into consideration in the Culver case; but we have shown that the purpose of a selector under the act of June 4, 1897, in making his selection is not an element in his right of selection and is wholly immaterial. See pages 25 and 27 appellant's opening brief in equity cases, 217 and 218 argued herewith, and Olive L. & D. Co. *v.* Olmstead, 103 Federal, 568.

ADDITIONAL REASONS GIVEN BY THE ANSWER FOR HOLDING CLARKE'S NON-MINERAL AFFIDAVIT INSUFFICIENT.

The answer gives only one other reason for rejecting Clarke's selections and denying him patents, which heretofore we have considered too trivial to notice; but since it was referred to upon the argument as of some consequence, we will briefly consider it; this reason is found in paragraph 3 (Record 123, 124), and is that Clarke struck out of the non-mineral affidavit filed by him the following language:

> "That no portion of said land is claimed for mining purposes under the local customs of rules of miners, or otherwise."

We submit that if land is not *known to contain mineral*, that is, if no mineral has ever been *discovered* thereon, which

the affidavit without the stricken out clause expressly negatives, it is wholly immaterial that some one may be claiming the land for mining purposes "under the local laws and customs of miners or otherwise," for such a claim would be utterly void and of no effect, as the statute expressly provides that there shall be no location of a mining claim until after the discovery of mineral within the boundaries thereof. See section 2320, Revised Statutes. So altogether outside of the necessity for filing any non-mineral affidavit as a condition precedent to the vesting of an equitable title in the selector under this act, the striking out of this particular language from the affidavit was wholly unimportant even had there been a local mining district, and consequently local rules and regulations under which miners could claim ; but as there was no such mining district and no local rules, regulations, or customs of miners, and none are even claimed by the answer, and in view of the fact that the language left in the affidavit expressly negatives the possibility of there being a *valid* mining claim on such land—as it negatives all *discovery* of mineral—without which there can *in law* be no mining claim, no matter what any local rule or custom of miners may provide—it shows the extent to which the Secretary is driven for him to urge, as is done in paragraph 3 of his answer (Record) that—

> "If any portion of said land was claimed for mining purposes under the local customs and rules of miners or otherwise, which said local customs and rules of miners are by act of Congress made a part of the mining laws of the United States, then the said lands were not vacant lands open to settlement within the intent and meaning of said act of June 4, 1897."

The Secretary must be presumed to know the well-established law, namely, that there is no power in a local mining

district to dispense with the necessity of an actual *discovery of mineral* within the boundaries of a mining claim as a condition precedent to the making of a valid mining location or the existence of a valid mining claim. Such a discovery is a statutory prerequisite and when it is negatived, as is done in this affidavit, it is wholly immaterial that the land might be claimed under some local mining rule or custom, or otherwise; as the United States mining laws only recognize local mining rules and customs when not in conflict with the provisions of the revised statutes. See section 2324, which provides:

> "The miners of each mining district may make regulations not in conflict with the laws of the United States or the State or Territory in which the district is situated, etc."

This provision, of course, is subject to the provision of section 2320 R. S., above referred to, that no location of a mining claim shall be made until the discovery of mineral within the same.

Another objection urged to the affidavits made in connection with Clarke's selections is (see paragraph 3 of answer, Record,), that there is inserted therein the following clause, which is alleged to impair or vitiate the other statements contained in the affidavit, namely:

> "This affidavit is made upon the evidence found upon the surface of the ground. Deponent does not undertake to express any opinion as to what may be under the ground.

It is perfectly evident here that the deponent wished to make it clear that he was speaking wholly from what he could see, from what was *known*, from what was *discovered*, and not from any theory or conjecture or belief as to what future underground developments might discover or develop or disclose. Such is the true rule, and the one which

the law would have adopted and applied to the affidavit, even had this clause not been inserted.

See Dughi *v.* Harkins, 2 L. D., 721, and Davis *v.* Wiebold, 139 U. S., 507.

That where land is returned and entered as agricultural in character, it is the ***known*** condition thereof at the time the purchaser's rights become vested that must control, and not the actual but ***undiscovered*** character thereof; this is throughly established by the leading case of Colorado Coal and Iron Company *v.* United States, 123 U. S., 307.

The last objection urged to the affidavit is that at the end of the clause saying that the selection is made with a view to selecting land for agricultural purposes is added the words "so far as deponent knows." This is even a more trivial and more unsubstantial objection than any of the others urged, for the reason, first, that the affidavits were made by one A. Barion, and not by Clarke himself, as is permitted by the only regulation of the department ever promulgated under the forest reserve act which seems to assume that a non-mineral affidavit is contemplated under such act. We refer to the instructions of March 6, 1900, (made several months after these selections were made), 29 L. D., 580, 581, which says that:

> "The non-mineral affidavit may be made by any credible person possessed of the requisite personal knowledge in the premises."

This instruction seems to take it for granted that such an affidavit is required under the forest lieu land act, and as it permits such an affidavit to be made by any one other than the selector possessed of the "requisite knowledge," and as this particular allegation referring to the "***purposes***" of the selector deals with a condition of the ***mind*** of the selector, any statement as to which ***mental condition*** when made by

another party must necessarily be qualified by the statement that the same is true "so far as deponent knows."

The second and principle reason why this qualifying statement is unimportant is that the statement which it qualifies—namely, that the land is sought for "*agricultural purposes*"—is entirely immaterial, as the right of selection under the statute in question in no wise depends upon the "purpose" of the selector or the use which he intends to make of the selected lands. *The statute has exacted no such condition and the department cannot*; and in view of the fact that upon the argument of these cases before the Assistant Attorney-General for the Interior Department, sitting for the Secretary of the Interior, he distinctly announced that this clause in the affidavit was of no consequence, as the statute did not make the selector's purpose an element in his right of selection, the *bona fides* of this objection may well be doubted. It at least suggests a lack of candor in the return.

NO NECESSITY FOR ANY NON-MINERAL AFFIDAVIT.

While it must be perfectly clear that the non-mineral affidavits which were made in this case show affirmatively that no mineral had been discovered on the land up to that time, and that this is all that under any reasonable view of the matter could possibly be required of the selector in order to establish the non-mineral charter of the land, yet we submit that the making of *any* non-mineral affidavit cannot be lawfully exacted of the selector by the land department under the act of June 4, 1897, *as a condition precedent to the making of a valid selection, or as a condition precedent to the vesting of the equitable title in the selector.*

Such an affidavit is not evidence having any binding force upon the Government or third persons; and where the land is returned as non-mineral such affidavit adds nothing to

the legal presumption that the land is non-mineral in character, and is therefore only cumulative; and it cannot be claimed that it is necessary as evidence of the selector's good faith, for his payment of the full purchase price of the selected land in advance, is sufficient evidence of his good faith in the transaction.

In this connection we call the court's attention to the discussion of the legal necessity of a non-mineral affidavit in connection with selections under the act in question, contained on pages 150 to 155 of appellant's brief in equity cases numbers 217 and 218 argued herewith, and to the recent letter of the Secretary of the Interior to the Chairman of the House Committee on Public Lands (record herein, pages 131, 132) asking for legislation authorizing the requiring of such non-mineral affidavits, and showing that two Federal courts have recently held that such requirement under the existing law is unlawful.

As pertinent to the Secretary's holding that by departmental regulation the Interior Department has, in its construction of the statute, lawfully exacted an affidavit not required by Congress, the following language of this court in Interstate Commerce Commission *v.* Cincinnati, etc., R. R. Co., 167 U. S., 479, 510, is in point:

> "Still again it is urged that the Commission has decided that it possesses this power, and has acted upon such decision, and an appeal is made to the rule of contemporaneous construction. *But it would be strange if an administrative body could by any mere process of construction create for itself a power which Congress had not given to it.*"

A MINERAL CLAIMANT MAY MAKE RECORD ENTRY IN THE LOCAL LAND OFFICE AS SOON AS HE HAS MADE A VALID MINING LOCATION.

While it is not at all essential to our case, and no issue is made upon it, it is proper to state that under the mining

laws a mining claimant is permitted to enter his claim of record, by making application for patent, immediately on discovery of valuable mineral deposits, and marking the boundaries of his claim. There is no other condition precedent to the contrary. There is no decision in the courts or in the land department to the contrary. All mineral statutes permit it.

Within sixty days after making application for patent, or before if he choses, the mineral claimant must do five hundred dollars' worth of work on his claim. The right, immediately upon discovery, to make record entry in the land office—that is to make his application for patent—affords a mineral claimant, after making a valid mining location, the same record protection as an agricultural claimant is given, and if he neglects this, he has no one to blame but himself.

This court has distinctly held, in Northern Pacific *v.* Colburn, 164 U. S., 383-386, and in Tarpey *v.* Madsen, 178 U. S., 215-221, and in a number of other cases, that the license or permission to occupy land given by statute to an intending homesteader for three months after settlement before making record entry is not a right *which attaches to the land*, as against a grantee of the United States. And if it is a proper construction of the agricultural laws to say that an intending homesteader occupying land without record entry under a statute guaranteeing him the license so to do, postpones his record entry at his own peril, and at the risk of the land being taken by a grantee of the Government at any time before his record entry is made, we submit that by parity of reasoning it may be held that the mineral claimant, under his license to explore and locate mineral lands, postpones his record entry—his application for mineral patent—at his peril, and that no right attaches in his favor as against the Government or its grantee, until such entry is made of

record ; for the license under which he operates is no more sacred or inviolable than that under which the homesteader acts. Each is a formal statute of the United States clearly according the privilege claimed, and if a right to the land does not attach in the one case as against the Government, or its grantee, there is no reason to hold that it does in the other. The law does not encourage a claimant of public lands under any statute to depend upon parol evidence of title, when the law affords him a perfectly clear means of acquiring record evidence thereof. The very life principle of real estate title is written evidence thereof ; but as already stated we are not in this case compelled to contend for any such position, and only make this suggestion that the court may see the analogy between the situation of a mineral claimant before record entry and that of an intending homesteader before record entry, each claiming under a statute purporting to give a license to occupy lands prior to record entry.

CONCLUSION.

The petition for mandamus alleges, and the answer admits, that the land selected by Clarke was *in fact unoccupied* when selected, and that Clarke had fully complied with all the *statutory* conditions entitling him to a patent, and hence the duty of the Secretary of the Interior to issue such patent became and was—under the decisions of this court—purely ministerial ; and the same was withheld solely on the ground and for the reason that Clarke did not comply with the superimposed requirements of an alleged departmental regulation—*a condition not prescribed by the statute*—which regulation in fact never existed ; and which would have been void had it existed ; and compliance with which was waived by the established departmental practice even though valid. It follows that the cancellation of Clarke's

selection, and the refusal to grant him patent, was "arbitrary and without just legal cause," and that mandamus should issue to compel proper action.

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